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No. 87-544

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PHILIP COOMBE, Superintendent of
Eastern Correctional Facility,

Petitioner,

-against-

ROBERT ESCALERA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

The Trial.....3
The Identification of Robert Escalera.....3
The Alibi Preclusion.....6
The State Court Appeal.....7
The District Court Opinion.....9
The Court of Appeals Decision.....11

REASONS FOR DENYING THE WRIT.....13

I. THE SECOND CIRCUIT'S RULING ON THE ISSUE OF IDENTIFICATION DOES NOTHING MORE THAN CONFIRM WHAT IS CLEAR FROM THE STATE COURT RECORD: THAT BOTH THE TRIAL COURT AND THE DISTRICT COURT RELIED UPON A DEMONSTRABLY FALSE ASSUMPTION OF FACT CRUCIAL TO THE DETERMINATION OF RELIABILITY.....13

II. THE WITNESS PRECLUSION ISSUE IS ALREADY PENDING BEFORE THIS COURT AND NEED NOT BE REVIEWED HERE.....16

III. NEITHER THE COURT OF APPEALS' EXHAUSTION RULE IN DAYE V. ATTORNEY GENERAL, NOR ITS SPECIFIC APPLICATION TO THIS CASE, CONFLICTS WITH APPLICABLE SUPREME COURT RULINGS ON EXHAUSTION OF STATE REMEDIES IN HABEAS CORPUS PROCEEDINGS.....21

CONCLUSION.....26

TABLE OF AUTHORITIES

Cases

Alicea v. Gagnon,
675 F.2d 913 (7th Cir. 1982).....17

Anderson v. Harless,
459 U.S. 4 (1982).....23,24

Braunskill v. Hilton, 629 F.Supp. 511 (D.N.J. 1986),
appeal pending, (3d Cir.).....17

Commonwealth v. Chappee,
659 F.Supp. 1220 (D.Mass. 1987),
appeal pending, No. 87-1286 (1st Cir.).....17

Daye v. Attorney General,
696 F.2d 186 (2d Cir. 1982)(en banc),
cert. denied, 464 U.S. 1048 (1984).....24,25

Dougan v. Ponte,
727 F.2d 199 (1st Cir. 1984).....24

Fendler v. Goldsmith,
728 F.2d 1181 (9th Cir. 1984).....17,20

Franklin v. Rose,
811 F.2d 322 (6th Cir. 1987).....24

Hackett v. Mulcahy,
493 F.Supp. 1329 (D.N.J. 1980).....9,17

Manson v. Brathwaite,
432 U.S. 98 (1977).....15

Martin v. Solem,
801 F.2d 324 (8th Cir. 1986).....25

Morrow v. Wyrick,
646 F.2d 1229 (8th Cir. 1981),
cert. denied, 454 U.S. 899 (1981).....24

Neil v. Biggers,
409 U.S. 188 (1972).....10,15

Nelson v. Solem,
714 F.2d 57 (8th Cir. 1983).....25

People v. Bush,
33 N.Y.2d 921, 352 N.Y.S.2d 936,
cert. denied, 419 U.S. 848.....21

People v. Merritt,
396 Mich. 67, 238 N.W.2d 31 (1976).....23

People v. Morales,
37 N.Y.2d 262, 372 N.Y.S.2d 25,
333 N.E.2d 339 (1975).....8,21,22

Picard v. Connor,
404 U.S. 270 (1971).....23

Purnell v. Missouri Dept. of Corrections,
753 F.2d 703 (8th Cir. 1985).....25

Snethen v. Nix,
736 F.2d 1241 (8th Cir. 1984).....25

Stovall v. Denno, 388 U.S. 293 (1967).....5

Taylor v. Illinois,
(No. 86-5963), cert. granted,
107 S.Ct. 946 (1987).....16,17

Tsirizotakis v. Lefevre, 736 F.2d 57 (2d Cir. 1984),
cert. denied, 105 S.Ct. 216.....25

United States v. Davis,
639 F.2d 239 (5th Cir. 1981).....17,18

United States ex rel. Enoch v. Hartigan,
768 F.2d 161 (7th Cir. 1985),
cert. denied, 106 S.Ct. 1281 (1986).....17

United States v. Wade, 388 U.S. 218 (1967).....5,14

Wardius v. Oregon, 412 U.S. 470 (1973).....8,21,22

Washington v. Texas,
388 U.S. 14 (1967).....8,22

Constitution

Sixth Amendment.....passim

Fourteenth Amendment.....2

Statutes

N.Y. Crim. Proc. Law 250.20.....2,6

28 U.S.C. 2254.....12

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RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Robert Escalera was convicted of felony murder on August 19, 1976 in Kings County Supreme Court in Brooklyn, New York before the Honorable Joseph R. Corso and a jury. (Indictment No. 4490/75) He was sentenced on September 24, 1976 to an indeterminate prison term of fifteen years to life.

The New York Appellate Division, Second Department affirmed respondent's appeal without opinion on February 27, 1978. People v. Escalera, 61 A.D.2d 890, 402 N.Y.S.2d 700 (2d Dept. 1978). Leave to appeal was thereafter denied by the New York Court of Appeals. 44 N.Y.2d 953, 408 N.Y.S.2d 1032 (1978).

On May 7, 1985 respondent filed his petition for a writ of habeas corpus in the Eastern District of New York before the

Honorable I. Leo Glasser. The petition raised two claims: 1) that preclusion of respondent's alibi witness for failure to give prior notice pursuant to N.Y. Crim. Proc. Law 250.20 violated his rights under the Sixth and Fourteenth Amendments; and 2) that admission of an in-court identification tainted by prejudicial pretrial identification procedures denied him due process of law.

On January 30, 1987 the district court issued a memorandum decision and order dismissing the petition. The district court held that Escalera had exhausted his state court remedies but it denied relief on the merits. Concurrent with its decision, the distict court granted a certificate of probable cause permitting respondent to appeal the decision to the Second Circuit.

On August 13, 1987 the court of appeals reversed the order of the district court and ordered the writ to issue unless the state of New York afforded respondent a new Wade hearing and trial within sixty days. The Second Circuit affirmed the district court's holding that respondent had adequately exhausted his federal claims in the state courts and ruled that respondent was entitled to relief on both the alibi preclusion issue and the identification issue.

On August 26, 1987 the court of appeals denied an application for bail pending further proceedings. On September 15, 1987 the court stayed its mandate pending review by this Court. On October 19, 1987 the Supreme Court also denied a renewed application for bail. On October 3, 1987, the District Attorney for Kings County filed a petition for writ of

certiorari.

The Trial

Most of the facts relevant to this habeas corpus proceeding are recited in the decisions of the district court and the court of appeals, copies of which are annexed as an appendix to the state's petition.[1]

On August 18, 1975 Jesus Cordero was walking in Fort Greene Park in Brooklyn with several friends, including Felix Torres and Pasquale Nieves. (3a) At approximately 6:30 p.m. the group was accosted by four young men who announced a holdup. One of the four men displayed a gun. Cordero swung at the gun with a bat he was holding but missed. The gunman fired a single shot, hitting Cordero in the chest. Cordero later died of his wound.

The Identification of Robert Escalera

Felix Torres and Pasquale Nieves constituted the state's entire case against Robert Escalera. No physical evidence was introduced at trial. No statements were made by the defendant. No other suspects were apprehended.

Torres and Nieves[2] testified at a Wade hearing that they went to the police station sometime after the shooting to look at photographs and that it was there for the first time that they identified Robert Escalera's picture as that of the

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[1]References to the state's appendix are indicated by numbers followed by the letter "a".

[2]Nieves testified throughout the proceedings with a Spanish interpreter.

gunman. (H.88-93, 134-137; Tr.155-56)[3] Torres also claimed to have seen Escalera on several prior occasions, although he did not tell the authorities this at the time of the shooting.[4]

Torres and Nieves differed in their accounts of the first identification. Nieves claimed to have gone to the stationhouse alone. Torres was "positively sure" that he was with Nieves. (H.135) He described in great detail sitting with Nieves alone in a room sorting through a box of photographs. Finding Escalera's picture, he handed it to Nieves. Nieves agreed with Torres that Escalera was the perpetrator. The photographs were never presented to the court for inspection.

Detective Harold Ruger also showed Torres and Nieves photographs on two other occasions. On September 3, 1975 he showed both of the witnesses (separately) an array of eight photographs that did not include Escalera's picture. No identification was made. On September 28, 1987 Ruger again showed the witnesses a photo array, this time containing Escalera's picture. They identified Escalera as the perpetrator. (3a)

On that same day, Ruger picked up Robert Escalera and brought him to the stationhouse. He placed Escalera alone in a

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[3]Page numbers following the letter "H" refer to the Wade hearing; numbers following the letters "Tr" refer to the trial.

[4]The district court found that this fact was not entitled to much weight because it took Torres "some time to bring this to the attention of the police. Thus, even if Torres remembered Escalera from incidents preceding August 18, the memory was hardly indelible." (39a)

room with a one-way mirror. Then, he permitted Torres and Nieves to view Escalera at the same time. Torres and Nieves agreed that Escalera was the gunman. (4a)

The trial court condemned the showup as "highly irregular and improper" (H.168) for two reasons. First, displaying a suspect alone instead of in lineup was inherently suggestive. See, Stovall v. Denno, 388 U.S. 293, 302 (1967). Second, permitting witnesses to make a joint identification was similarly fraught with prejudice. See, United States v. Wade, 388 U.S. 218, 234 (1967).

The trial court, nevertheless, allowed the witnesses to make an in-court identification. Justice Corso reasoned that the effects of the "highly irregular and improper" showup were neutralized by the prior non-suggestive photographic identification of September 28. (H.168-169) In addition, the court ruled that the witnesses had a sufficient opportunity to view the perpertrator at the time of the offense and that one witness, Torres, had seen the perpretrator on prior occasions.

Justice Corso omitted any reference whatsoever to the first joint photographic identification that took place at the stationhouse under unsupervised conditions.

At trial Torres repeated his testimony concerning the joint, unsupervised photographic identification at the stationhouse. In addition, Detective Ruger himself confirmed that, according to police records, the initial viewing had taken place. Furthermore, Ruger admitted knowing of the first viewing but

claimed he was unaware that an identification had been made. (5a)

Respondent's murder trial consisted of two days of testimony. On cross-examination, defense counsel focused on the inconsistencies between the initial descriptions of the gunman and the later identifications.

During jury deliberations, the jury made a special request to re-hear testimony concerning Torres' viewing of the photographs at the precinct. (6a-7a)

The Alibi Preclusion

When the state rested, the defense put in alibi testimony. Robert Escalera himself testified that he had come home from work around 5:30 p.m. and had met his friend, Sam Gonzalez, at a bus stop and stayed with him till about 7:30 p.m., except for about half an hour between 6:00 and 6:30 p.m., at which time Escalera was at home eating and showering. Gonzalez was called to confirm this testimony.

After Escalera had testified on direct examniation, trial counsel informed the court that he wished to call respondent's brother, Peter Escalera, as an alibi witness to testify that he was home with Robert during the crucial time period of 6:00 to 6:30 p.m. (5a) Peter Escalera had not been listed as an alibi witness pursuant to N.Y. Crim. Proc. Law 250.20.

Counsel had no adequate explanation for his failure to list Peter Escalera as an alibi witness. He explained that he originally intended to call respondent's father but that the latter's heart condition made his testifying inadvisable. When

confronted with the fact that the father had not been listed either, counsel responded that he didn't think it necessary to list him because the prosecution was well aware of respondent's family and had discussed the case pretrial with respondent and his father, and that in any case he was uncertain about calling family members as witnesses.

The prosecution objected to Peter's testimony unless given an opportunity to interview him with a stenographer present. (Tr.233) The trial court refused to grant even a brief continuance because it did not wish to disrupt its schedule for trying its next case. Peter Escalera was therefore precluded from testifying.

The State Court Appeal

On appeal to the New York Appellate Division, Second Department, respondent argued for a new trial based on the preclusion of his alibi witness and the admission of a tainted pretrial identification.

Although respondent described the alibi preclusion as an abuse of discretion, his state court brief argued that the decision to preclude was an abuse of discretion because of its effect on his Sixth Amendment right to present a defense. Respondent's state court brief explicitly noted that

> a judge's choice to invoke preclusion jeopardizes the fundamental and important Constitutional right of a defendant to have compulsory process for obtaining witnesses in his favor.

(Brief at 48)

In addition, respondent cited a United States Supreme Court

case and a New York Court of Appeals case that discussed the issue of witness preclusion: Wardius v. Oregon, 412 U.S. 470 (1973) and People v. Morales, 37 N.Y.2d 262, 372 N.Y.S.2d 25, 333 N.E.2d 339 (1975). Respondent himself pointed out that

> [n]either Wardius nor Morales addressed the constitutional validity of the preclusion sanction per se, apart from the reciprocity issue.

(Brief at 42) Nevertheless, respondent indicated to the Appellate Division that he was relying on the reasoning of Morales to argue that the New York Court of Appeals

> therein implicitly recognized the fundamental prejudice inherent in the preclusion of an alibi witness under any circumstances.

(Brief at 41-42)

Escalera also quoted directly from Morales[5] to show that the New York Court of Appeals believed that prejudice to the state in calling unlisted alibi witnesses could be minimized by various measures, including the granting of a continuance. (Brief at 42)

Respondent also argued that admission of the in-court identification had denied him due process in light of the prejudicial pretrial procedures used. In reply, the state of New York argued that the procedures used were fair. In addition, the state of New York conceded in its state court brief that Felix

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[5]Morales explicitly refers to the constitutional basis of the right to call witnesses: "[W]hen the ability to call witnesses is frustrated, we are not faced with a tactical or procedural inhibition of uncertain effect. The importance of this right is underwritten in the Sixth Amendment of the United States Constitution, which through the Fourteenth Amendment is applicable to the States (Washington v. Texas, 388 U.S. 14 (1967)). 333 N.E.2d at 344.

Torres and Pasquale Nieves had participated in a joint, unsupervised photographic identification at the stationhouse before being shown photographs by Detective Ruger:

> Two or three days after the shooting, both men went to the police station where they were shown boxes of photographs. Although they were in the same room, they were looking at different photographs. Torres recognized appellant's picture, but without saying anything showed it to Nieves. Nieves immediately said, "Yeah, that's the guy," to which Torres replied, "I'm glad you know it too." They then told a police officer that the picture was of the gunman (N:72, 88, 92-92; T:135-138)

(State's appellate brief at 3-4) A few pages later the state added a footnote:

> Although the trial court did not specifically mention the first photographic identification (at the precinct) in his brief summary of the facts, his ruling that the displays were not suggestive implicitly included a finding as to the first as well as the later incidents, since that evidence was clearly before him and defense counsel had stressed it in his arguments (154-156).

(State's appellate brief at 12)

The Appellate Division affirmed the conviction without opinion and the New York Court of Appeals denied leave to appeal.

The District Court Opinion

The district first reached the exhaustion issue and held for respondent. The court cited respondent's specific reference to a defendant's "fundamental and important Constitutional right of obtaining witnesses in his favor." Furthermore, the court found it "'inconceivable that in finding "no abuse of discretion" [the appellate division] did not implicitly hold that preclusion did not violate petitioner's right to due process of law.' Hackett v. Mulcahy, 493 F.Supp. 1329, 1335 (D.N.J. 1980)" (25a)

The district court then proceeded to dismiss the petition on the merits. Analyzing the alibi claim, the court balanced a number of relevant factors[6] but concluded the trial court's decision to preclude was a reasonable exercise of discretion that did not violate respondent's Sixth Amendment rights. (31a)

On the issue of identification, the court applied the factors enumerated in Neil v. Biggers, 409 U.S. 188 (1972) to determine whether the effect of a suggestive pretrial identification was sufficiently neutralized by other circumstances showing the identification to be independently reliable. The district court relied heavily upon the fact that the grossly prejudicial joint showup identification had been preceded by a non-suggestive photographic identification on September 28th:

> Obviously, circumstances would be different had the showup preceded the photographic exhibitions. (37a)

The district court alluded to Nieves' and Torres' testimony of having previously viewed photographs at the precinct house, but it found that the trial court properly relied on Detective Ruger's testimony, indicating that the first photographic viewings occurred on September 3d and September 28th:

> But the court credited Ruger's version, and this finding of a historical fact is entitled to the statutory presumption of correctness. (34a)

At the conclusion of its decision, the district court re-

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[6]Those factors included 1) preventing surprise, 2)effectiveness of less severe sanctions, 3) materiality of the testimony, 4) prejudice to the state, 4) evidence of bad faith, and 5) timing of the violation. (29a)

emphasized its earlier point:

> [I]t is crucial that the showup followed an untainted photographic identification. In other words, the corrupting effect of the showup was, at best, minimal, because the showup merely confirmed the more difficult and impressive identification from the photographic arrays. (39a)(emphasis in original)

The Court of Appeals Decision

The Second Circuit upheld the district court's finding that respondent had adequately exhausted his claims in state court, holding that the "nature and the presentation of the claim, considered together, were sufficient to direct the court's attention to the Sixth Amendment." (9a)

The court of appeals also held that the district court was correct in applying a balancing test to determine the constitutionality of witness preclusion, but it said that its conclusions "were insufficient or unsupported by the evidence in certain vital areas." (13a)

First, the district court erred in attaching insufficient weight to the importance of Peter Escalera to respondent's defense. The lower court itself admitted that Peter's testimony "might have been material to the outcome of the trial." (13a) Yet, the court then proceeded to minimize the importance of the testimony. As the circuit court noted:

> There simply is nothing more material to Escalera's guilt or innocence than the evidence of his whereabouts during the thirty minutes immediately preceding the the crime. (13a)

The court of appeals also disagreed with the lower court's assessment of prejudice to the state, holding that any potential

for prejudice could have been eliminated by a brief continuance. Most significantly, the court noted that a continuance was all the state had asked for, and that its only claim of prejudice concerned admission of the testimony without a chance to interview the witness. (14a) Accordingly, the court of appeals held that preclusion of an important alibi witness solely as a sanction for violation of a discovery rule, absent a demonstration of substantial prejudice to the state, was constitutionally impermissible. (18a)

The Second Circuit also found in favor of respondent on the issue of identification. It held that under 28 U.S.C. 2254(d)(1982) the state court's findings of fact were not entitled to a presumption of correctness. [redacted] clear evidence in the trial transcript,

> the record does not fairly support the factual determinations underlying the trial court's reliability conclusion and...the district court was therefore required to conduct an evidentiary hearing into the disputed finding. (14a)

The court of appeals was impressed by the state's witnesses' ability to testify "with particularity" (14a) that they had viewed photographs at the precinct without supervision and prior to the September 3d or September 28th viewings. Most important, the court pointed out that there was no contrary testimony to this fact. The only inconsistency was whether Torres and Nieves were together or alone at the time. (15a)

Deferral to the state court's "findings" on this point, said the court, was error where the state court record itself

conclusively showed the factual assumption was flawed. (16a) Although the Second Circuit ruled that the district court should have held a hearing, it concluded that under the circumstances, it would remand the entire case to the state courts for a new Wade hearing and for a new trial.

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT'S RULING ON THE ISSUE OF IDENTIFICATION DOES NOTHING MORE THAN CONFIRM WHAT IS CLEAR FROM THE STATE COURT RECORD: THAT BOTH THE TRIAL COURT AND THE DISTRICT COURT RELIED UPON A DEMONSTRABLY FALSE ASSUMPTION OF FACT CRUCIAL TO THE DETERMINATION OF RELIABILITY

The identification issue presents no point of law for this Court to review. The dispute here is not over the correct legal standard to be applied in evaluating identification testimony. The issue is simply whether the trial court and the district court relied upon a demonstrably false factual assumption in holding that the in-court identification was sufficiently free of taint to be constitutionally admissible.

The linchpin of the argument at trial and in the district court was that the highly prejudicial showup was preceded by a fair photographic array. The eyewitnesses themselves, however, testified without contradiction that the photo array relied upon as fair was itself preceded by another array that was unsupervised, uncontrolled, and unpreserved for judicial review.

The state complains that the court of appeals drew improper and unwarranted conclusions from the trial court's silence concerning the first viewing. The state's own conclusions, however, have shifted dramatically in the course of this

litigation. In the state courts, the state conceded not only that a prior viewing took place, but that the viewing was a joint, unsupervised viewing in which Torres picked out Escalera's picture and showed it to Nieves. On appeal to the Second Circuit and in its petition to this Court, the state has adopted an alternative argument: either the state court properly discredited the eyewitnesses' testimony that the prior precinct viewing occurred, or it credited their testimony but implicitly and properly found that the procedure was not unfair. Neither of these positions can withstand analysis.

First, if the trial court believed that stationhouse photographic identification had occurred, it is inconceivable that the court would fail even to mention that fact. The trial court's Wade ruling makes this obvious. The court acknowledged that the joint showup was seriously prejudicial, but emphasized that the photo arrays of September 3d and September 28th were free of suggestiveness.[7] To assume that the court would have discussed the September arrays in depth yet utterly fail even to mention a preceding photo array defies logic. No one but the district attorney has suggested this scenario as a plausible possibility.

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[7]Thus, when the trial court ruled that the in-court identifications were based on independent recollection and not on the prejudicial showup, it did so based on the presumption that the witnesses had made a previous identification free of any taint. In fact, however, the showup merely compounded and reinforced the prejudice created by the first photographic identification. See United States v. Wade, 388 U.S. 218, 229 (1967)(once witness picks out a suspect, he is not likely to go back on his word).

The second alternative is the only logical one--that the trial court did not believe that a prior identification had occurred. Yet, both the Wade and trial minutes demonstrate that this assumption was not true. Moreover, the evidence in favor of the first of identification was not ultimately contradicted.

This raises the question why the trial court ignored the uncontroverted testimony of the eyewitnesses. The answer is that Detective Ruger's Wade hearing testimony was extremely misleading on this point and was only clarified later at trial. Ruger testified that the first time he showed the witnesses photographs was on September 3d. This led the trial court to believe that the first viewing occurred on that date. But at trial, Ruger explained that he had not worked on the case from its inception. When he said he first showed the witnesses pictures on September 3d, he did not mean to say that the witnesses had not viewed photographs before then. In fact, Ruger admitted knowing that the witnesses had previously viewed photographs at the station, but he claimed he had been unaware that an identification had been made. The trial court, therefore, was erroneously led to believe that no prior identification had taken place, but this was simply not true.

The court of appeals was perfectly correct in holding that a new Wade hearing was necessary. Manson v. Brathwaite, 432 U.S. 98, 114 (1977) requires that a court weigh any factors tending to show reliability (as enumerated in Neil v. Biggers, 409 U.S. 188 (1972)) "against the corrupting effect of the suggestive

identification itself." That weighing process was skewed by a mistaken belief that only one suggestive identification had occurred, when in fact there were two such events.

The transcript of the trial speaks for itself. This is not a case in which a federal court makes its own new findings of fact in opposition to those of the trial court. There is in this instance no danger of the federal courts usurping state court prerogatives. The district court deferred to an implicit finding of fact that was obviously in error. The court of appeals merely pointed out that error and left it to the state courts to correct through a new Wade hearing. That decision was both proper and sensitive to principles of federalism. Accordingly, there exists no issue of federal law worthy of review by this Court.

II. THE WITNESS PRECLUSION ISSUE IS ALREADY PENDING BEFORE THIS COURT AND NEED NOT BE REVIEWED HERE

This Court has just recently heard argument in Taylor v. Illinois, cert. granted, 107 S.Ct. 946 (1987)(86-5963), a case that raises the question of whether or when preclusion of a defense witness as a sanction for violating a state discovery rule is constitutionally permissible under the Sixth and Fourteenth Amendments. Having accepted Taylor, this Court obviously considers the question important enough to merit its review. Nevertheless, with Taylor having been fully briefed and argued and pending for a decision, there is little reason to take certiorari on a similar case presenting substantially the same issue.

Even if Taylor were not pending, nothing in the Second Circuit's opinion indicates the application of any extravagant new rule of law in need of correction or modification by this Court. The state of New York contends that the circuits are split over the question of alibi preclusion and that the Second Circuit's decision departs from the mainstream of constitutional theory.

That is not the case. A review of federal decisions on the issue of witness preclusion for discovery violations reveals first, that this area of law is more remarkable for its uniformity of analysis than for its inconsistency and second, that the court of appeals' methodology follows the majority rule, which has adopted a balancing test of relevant factors to determine the constitutionality of preclusion in a given case. See, Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982); United States ex rel. Enoch v. Hartigan, 768 F.2d 161 (7th Cir. 1985), cert. denied, 106 S.Ct. 1281 (1986); Fendler v. Goldsmith, 728 F.2d 1181 (9th Cir. 1984); Commonwealth v. Chappee, 659 F.Supp. 1220 (D.Mass. 1987), appeal pending, No. 87-1286 (1st Cir.); Braunskill v. Hilton, 629 F.Supp. 511 (D.N.J. 1986), appeal pending, (3d Cir.); Hackett v. Mulcahy, 493 F.Supp. 1329, 1336 (D.N.J. 1980); but see, United States v. Davis, 639 F.2d 239 (5th Cir. 1981)(preclusion constitutionally improper solely as sanction for discovery violation).

In fact, the only court to have adopted a per se rule forbidding witness preclusion as a discovery violation sanction

is the Fifth Circuit in United States v. Davis, 639 F.2d 239 (5th Cir. 1981). The instant case is noteworthy for the Second Circuit's explicit rejection of any per se rule in favor of the more moderate, case-specific balancing test.

The factors chosen by the Second Circuit as appropriate for consideration are likewise, both reasonable and gleaned from prior federal case law on the subject. They include: 1) the importance of the witness; 2) the prejudice to the state; 3) availability of less severe sanctions; 4) the reason for the violation; and 5) complicity of the defendant.

The key to the Second Circuit's reasoning lies in its analysis of the purpose of alibi notice requirements--to prevent surprise and prejudice to the state. Given the harshness of the preclusion sanction and its potential effect on the truthfinding function of the criminal process, the court concluded that preclusion was inappropriate where prejudice to the state has not been demonstrated or is easily curable.

In addition, the court's application of that test to the facts of this case was entirely reasonable. First, the Court of Appeals stressed that "the weight afforded to the factors relevant to preclusion is left to the sound discretion of the trial judge, based on evidence in the record and supported by appropriate findings of fact." (13a)(emphasis added) What the Court of Appeals found improper at respondent's trial was the trial judge's failure to consider the relevant factors. (Id.) The trial court relied almost exclusively upon the disruption of

its anticipated trial schedule in denying a brief continuance.

In reversing the denial of habeas corpus relief, the Second Circuit ruled that th district court improperly applied the balancing test based on the district court's own findings. Judge Glasser acknowledged that the threat of prejudice to the State was only "potential". The court also noted that a brief adjournment to interview Peter Escalera would have been sufficient to cure any potential prejudice and that the State had asked for nothing more than that.

The court's ruling was carefully tailored to the specific facts of this case. The prosecution itself claimed no prejudice so long as it received its requested short continuance to interview Peter Escalera with a stenographer. When Escalera's lawyer asked to put Peter Escalera on the stand, the state was content to interview him on the record first and then let him testify.

The state also knew of Escalera's alibi defense. He had previously given notice of it. He and his father had discussed the case with the authorities. Escalera himself had testified on the stand. The testimony that Peter would have offered was completely predictable and consistent with what the state already knew the alibi to be: that Escalera was at home with his family around the time of the holdup.

These facts also demonstrate that the failure to give notice, while not justified, was a result of poor lawyering and a change of trial strategy. It was not a tactical move designed to

give the defense an unfair advantage. Furthermore, counsel admitted it was his fault, not his client's. Under the circumstances, a defendant should not be penalized for his lawyer's mistake on so crucial an issue where the mistake is easily curable while the trial is still in progress.

The materiality of the testimony played an important part in the court's analysis. See, Fendler v. Goldsmith, 728 F.2d 1181 (importance of the testimony is the primary factor to considered) The case against Escalera was far from overwhelming. Testimony consumed a scant two days in a serious murder trial. The only evidence in the case was the eyewitness testimony of two witnesses whose initial identification of respondent occurred under highly questionable and prejudicial circumstances. Peter Escalera's testimony would have covered a period of time not covered by respondent's other witness, Sam Gonzalez. The court of appeals here adopted a sensible balancing test which it carefully applied to the specific facts of a case in which the guilt of the defendant was truly in doubt. The court's determination that Robert Escalera did not receive a fair trial was correct and its conclusions of law merit no review in this Court.

III. NEITHER THE COURT OF APPEALS' EXHAUSTION RULE IN DAYE V. ATTORNEY GENERAL, NOR ITS SPECIFIC APPLICATION TO THIS CASE, CONFLICTS WITH APPLICABLE SUPREME COURT RULINGS ON EXHAUSTION OF STATE REMEDIES IN HABEAS CORPUS PROCEEDINGS

Escalera Fairly Presented the Substance of His Federal Claim to the State Courts

Respondent's state appellate brief gave ample notice of the the constitutional nature of his witness preclusion claim to the New York Appellate Division. The State of New York criticizes respondent for failing to cite any cases that squarely raised the constitutional issue. But, when Escalera filed his state court brief some ten years ago, there were no New York or Supreme Court cases directly on point, as his brief noted at p. 43. Lacking any precise authority from the state's highest court or from the Supreme Court, Escalera cited a case that most nearly approximated his claim. That case was People v. Morales, 37 N.Y.2d 262, 372 N.Y.S.2d 25, 333 N.E.2d 339 (1975).

New York's notice-of-alibi statute had at that time been ruled unconstitutional in People v. Bush, 33 N.Y.2d 921, 352 N.Y.S.2d 936, cert.denied, 419 U.S. 848 for failure to provide for reciprocal discovery as required by this Court's decision in Wardius v. Oregon, 412 U.S. 470 (1973). The issue in Morales was whether Wardius and Bush were entitled to retroactive effect in New York.

Although the New York Court of Appeals ruled only in favor of retroactivity, Morales is important for its discussion of why

retroactivity was appropriate. The decision contains numerous references to the fundamental importance of the right to present witnesses in one's defense and to the grave threat to a defendant's constitutional rights posed by witness preclusion. Furthermore, the Morales court relied explicitly on the Sixth Amendment:

> [W]hen the ability to call witnesses is frustrated, we are not faced with a tactical or procedural inhibition of uncertain effect. The importance of this right is underwritten in the Sixth Amendment of the United States Constitution, which through the Fourteenth Amendment is applicable to the States (Washington v. Texas, 388 U.S. 14 (1967).

People v. Morales, 333 N.E.2d at 344.

When Escalera cited this opinion to the New York Appellate Division, he specifically noted that the precise holding of Morales dealt only with the reciprocal discovery issue. But he also made it clear that he was citing Morales for a different reason; namely, because

> the Court of Appeals therein implicitly recognized the fundamental prejudice inherent in the preclusion of an alibi witnesses' [sic] testimony under any circumstances. Neither Wardius nor Morales addressed the constitutional validity of the preclusion sanction per se, apart from the reciprocity issue. In noting the profound effect on the fact finding process of the exclusion of such a witnesses' [sic] testimony, the Court emphasized its crucial character....

(Brief at 41-42)

Notwithstanding appellate counsel's references to abuse of discretion, his presentation of the claim and his citation to cases such as Morales made the constitutional underpinnings of his argument clear enough. This is best demonstrated by

counsel's discussion of People v. Merritt, 396 Mich. 67, 238 N.W.2d 31 (1976):

> The Court noted that a judge's choice to invoke preclusion jeopardizes the fundamental and important Constitutional right of a defendant to have compulsory process for obtaining witnesses in his favor.

(Brief at 48)

Escalera's state court presentation of his claim falls well within the requirements of Anderson v. Harless, 459 U.S. 4 (1982). In Anderson the petitioner had argued in state court that the trial court's instructions were "erroneous" and constituted "reversible error," without citing any section of the Constitution that might have alerted the state to any possible federal claim. Escalera did cite the Constitution and he made specific reference to the Compulsory Process clause.

Furthermore, Escalera's Sixth and Fourteenth Amendment claim that preclusion of his witnesses denied him the ability to present a defense is by no means a novel one. Indeed, his argument that preclusion was unnecessary and highly prejudicial to his defense is precisely what Escalera complained of in state court.

In Picard v.Connor, 404 U.S. 270 (1971) the petitioner argued in state court that the procedures for amending a grand jury indictment did not comply with Massachusetts law. In federal court he challenged the amendment process on equal protection grounds. The Supreme Court noted that the petitioner's state court brief gave the state courts no hint of any equal protection claim and that nothing in the state law

claim would have suggested such a theory. Accordingly, the Court ruled that the state courts had never had an adequate opportunity pass on the merits of the federal claim.

Escalera's references to abuse of discretion and to his right of compulsory process, by contrast, were inextricably interwoven. The thrust of the argument to the state appellate division was that preclusion was an abuse of discretion precisely because of its effect on his Sixth Amendment rights. See Morrow v. Wyrick, 646 F.2d 1229, 1232 n.5 (8th Cir. 1981), cert. denied, 454 U.S. 899 (1981)(confrontation clause issue fairly presented even though raised only "implicitly" through discussion of hearsay aspects of unavailable witness testimony because hearsay rules and Confrontation Clause are intimately related, though not identical).

Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982)(en banc), cert. denied, 464 U.S. 1048 (1984) does not establish too lenient an exhaustion test for habeas petitioners and it does not conflict with this Court's teachings. In fact, the Second Circuit cited Anderson v. Harless when it decided Daye. Furthermore, this Court was asked to review Daye on certiorari when Daye was decided. The Court denied certiorari then and it should deny it now.

The State's claim that Daye conflicts with decisions of other circuits is greatly exaggerated. Several circuits have cited Daye with approval in denying relief. See, e.g., Dougan v. Ponte, 727 F.2d 199, 201 (1st Cir. 1984); Franklin v. Rose, 811

F.2d 322, 326 (6th Cir. 1987); Nelson v. Solem, 714 F.2d 57 (8th Cir. 1983); Snethen v. Nix, 736 F.2d 1241 (8th Cir. 1984). Even courts that consider the Daye test to be more lenient than their own have denied relief under Daye. See Martin v. Solem, 801 F.2d 324, 331 (8th Cir. 1986); Purnell v. Missouri Dept. of Corrections, 753 F.2d 703,708 (8th Cir. 1985).

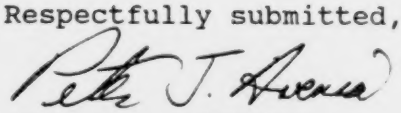
In addition, the Second Circuit itself has shown that it is perfectly capable of dismissing habeas petitions under Daye when federal claims have not been fairly presented to the state courts. See, Tsirizotakis v. Lefevre, 736F.2d 57, 61 (2d Cir. 1984), cert.denied, 105 S.Ct. 216 (finding failure to exhaust under Daye because citation of state cases employing state law analysis was insufficient to alert state court to constitutional basis of claim).

The Second Circuit's opinion in Daye v. Attorney General is consistent with the Supreme Court's controlling decisions on exhaustion of state court remedies. The application of that rule in the instant case was also consistent with those rulings. Accordingly, there exists no need to reevaluate the Second Circuit's decision and the petition for certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Peter J. Avenia, a member of the bar of the Supreme Court of the United States, hereby certifies that on this day a copy of the within brief in opposition to a petition for a writ of certiorari was served upon the District Attorney for Kings County and the original filed with the Clerk of the Supreme Court by mailing said copies by Federal Express, overnight delivery, to the following addresses:

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November 5, 1987

Peter J. Avenia